HLB NOMINEES (TEMPATAN) SDN BHD

v.

SJA BHD & ANOR AND ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
ABDUL AZIZ MOHAMAD JCA
HASHIM YUSOFF JCA
[CIVIL APPEAL NOS: P-02-656-2002 & P-02-597-2002]
13 JANUARY 2004

COMPANY LAW: *Meetings - Enlargement of time to hold EGM granted by court - Whether enlargement granted was not proper as notice to hold meeting was declared null and void - Companies Act 1965, ss. 144(3), 355*

COMPANY LAW: *Meetings - Extraordinary general meeting - Convening of meeting within there months - Whether three months to commence from date of deposit of requisition or after 21 days from date of deposit of requisition - Companies Act 1965, s. 144(3)*

CIVIL PROCEDURE: *Functus officio - Jurisdiction of judge - Jurisdiction of judge to grant order for enlargement of time to hold company meeting - Whether judge functus officio in view of earlier order that notice to hold meeting was null and void - Whether principles of res judicata and estoppel applicable*

HLB Nominees (Tempatan) Sdn Bhd was the defendant in the originating summons (the 'defendant') whilst SJA Berhad and its managing director were the 1st plaintiff and the 2nd plaintiff respectively (the '1st plaintiff' and '2nd plaintiff' or the 'plaintiffs'). The facts showed that the defendant deposited a requisition for an extraordinary general meeting ('EGM') with the 1st plaintiff for the removal of certain directors including the 2nd plaintiff pursuant to s. 144(1) of the Companies Act 1965 ('the Act'). The 1st plaintiff did not convene the meeting and the defendant then issued a notice ('the notice') to the shareholders of an EGM. An issue arose whether the date for the convening of the EGM stated in the notice fell within the three-month period stipulated under s. 144(3) of the Act. The plaintiffs then applied to the court for a determination whether the three-month period in s. 144(3) of the Act ran from the date of the deposit of the requisition or from the expiry of 21 days after the date of the deposit of the requisition. The 21-day period was the time frame for the defendant to convene the meeting in the event the plaintiffs failed

to do so. If the three-month period were to run after the 21 days from the date of the deposit of the requisition, the notice would be within the three-month period. If, however, it ran from the date of deposit of the requisition, the notice would fall outside the three-month period. The learned judicial commissioner ('JC') held that the convening of an EGM should be from the date of deposit of the requisition and as a result thereof the notice was declared null and void (the 'earlier order'). However, when the defendant applied for an enlargement of time to hold the EGM and to validate the notice the JC granted the application (the 'subsequent order'). Hence the appeals before this court. Appeal no. P-02-656-2002 was the defendant's appeal against the earlier order of the JC. However, the defendant did not pursue the appeal before this court. Appeal no. P-02-597-2002 was the plaintiffs' appeal against the subsequent order of the JC. The decision of this court was in relation to the latter appeal by the plaintiffs.

Held (allowing the appeal)

Per Mokhtar Sidin JCA (majority):

[1] Once a court of unlimited jurisdiction makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be reopened unless that order is clearly illegal, null or void. (p 46 f)

[2] The JC declared the notice null and void. The declaration was specific. Despite this declaration the defendant filed an application in the same court for enlargement of time and for a declaration that the notice was valid and effective. Therefore, the principal relief sought by the defendant in the application was to have the notice declared valid and effective because without any valid or effective notice there could not be any enlargement of time. This was in direct contradiction to the earlier order given. The earlier order could only be reversed by way of an appeal to a higher court and not by way of an application to the same court because there was nothing illegal in respect of it. The JC in making the earlier order had the jurisdiction to do so. Therefore the plaintiffs were within their right to object to the application by the defendant for enlargement of time on the ground that the court was *functus officio* and that *res judicata* and estoppel were applicable. Further, the application by the defendant for the enlargement of time, being an attempt to resuscitate an issue that was decided earlier, was an abuse of the process of the court. (pp 47 f-h & 48 a-c)

[3] The JC was in error in exercising her discretion under s. 355(4) of the Act to allow the defendant to enlarge the time in respect of the notice because of the earlier order declaring it null and void. The words "shall not be held after the expiration of three months from that date" in s. 144(3) of the Act are mandatory and incapable of being enlarged. (pp 52 a & 53 e)

[4] The purpose of the EGM was to remove some of the existing directors and in their place to elect the directors of the defendant's choice. A proper and valid notice of such a meeting should be issued because it affected the rights of those directors who were duly elected at a proper and valid AGM of the company concerned. As such, the process and procedure for calling such a meeting should be adhered to strictly. Any defect in the process or procedure thereof is not curable under s. 355 of the Act. In the present case, not only was the notice defective due to the fact that the EGM to be held exceeded the permissible three-month period but it was also declared null and void. Nevertheless, there was nothing to prevent the defendant from making another requisition for another EGM whereby if the plaintiffs failed to convene that EGM, the defendant was at liberty to issue a proper and valid notice to hold the said meeting. (p 56 d-f)

[5] The discretionary power under s. 355 of the Act is not unfettered. It must be exercised judiciously and the justice of the case should be considered seriously. Although there was an appeal against the earlier order, the defendant did not proceed with it. As such, the earlier order was still subsisting and effective. The JC should not have granted the subsequent order that had in essence nullified the earlier order. (pp 60 h & 61 a)

[6] There was no restriction to shareholders as to the number of requisitions to be made. When the defendant was told that the holding of the meeting stated in the notice was improper, the defendant could easily serve another requisition on the plaintiffs. The defendant could have applied to the court to call for the meeting under s. 150 of the Act. (p 61 d-g)

[7] There was no reason to blame the plaintiffs for not holding the EGM as they were resisting the removal of the directors elected at the previous AGM. Further, the failure of the plaintiffs to supply the list of the shareholders to the defendant would not in any way affect the defendant's right to call for the EGM within the stipulated period. Under s. 144(3) of the Act, there was no requirement for the full list of the shareholders to be supplied before the defendant could call for the EGM. That the plaintiffs failed to supply the list of shareholders to the defendant was only an excuse by the defendant to justify its application for enlargement of time. (pp 62 b-h & 63 a-b)

Per Abdul Aziz Mohamad JCA (dissenting):

[1] In reality, the earlier order should be seen as a provisional order, *ie*, an order that declared the notice invalid only as matters then stood and subject to enlargement being granted, which if and when granted would validate the notice. Therefore the circumstances did not warrant the application of the principles of *functus officio* and *res judicata*. (p 68 c)

[2] There was no reason why the time period under s. 144(3) of the Act could not be judicially extended where it was justified as in the present case when it was the plaintiffs themselves that had disabled the defendant from meeting the deadline. In view of the existence of s. 355(4) of the Act, it would require express words to render the time period in s. 144(3) of the same incapable of enlargement. (p 69 e-f)

[3] There was ample evidence before the JC for finding that the plaintiffs' delaying tactics and total failure to consent to supply a copy of the share register to the defendant resulted in the inability of the defendant to comply within the time limit in s. 144(3) of the Act. The defendant did take immediate steps to request for the list of shareholders with an undertaking to pay the cost incurred. That the defendant did not ask how much was to be paid was without merit. The share registrars should, if they wished to comply with the request, have replied stating the said list would be supplied upon payment of such and such a sum. (pp 69 h & 70 a-d)

*[**Bahasa Malaysia** Translation Of Headnotes*

Dalam tindakan saman pemula di sini, HLB Nominees (Tempatan) Sdn Bhd adalah defendan ('defendan') manakala SJA Berhad dan pengarah urusannya adalah masing-masing plaintif pertama dan plaintif kedua ('plaintif pertama' dan 'plaintif kedua' atau 'plaintif-plaintif'). Fakta menunjukkan bahawa defendan telah membuat rekuisisi untuk memanggil mesyuarat agong luarbiasa ('EGM') plaintif pertama bagi menyingkir beberapa pengarahnya, termasuk plaintif kedua, di bawah s. 144(1) Akta Syarikat 1965 ('Akta'). Plaintif pertama tidak mengadakan mesyuarat dan defendan mengeluarkan notis ('notis') kepada pemegang-pemegang saham tentang EGM itu. Isu telah berbangkit mengenai sama ada tarikh memanggil EGM seperti yang tertera di dalam notis mematuhi tempoh tiga bulan yang ditetapkan oleh s. 144(3) Akta. Plaintif-plaintif kemudian memohon kepada mahkamah bagi menentukan sama ada tempoh tiga bulan di dalam s. 144(3) bermula dari tarikh rekuisisi dibuat atau selepas luputnya tempoh 21 hari dari tarikh rekuisisi tersebut. Tempoh 21 hari adalah masa bagi defendan memanggil mesyuarat seandainya plaintif-plaintif gagal

berbuat demikian. Jika tempoh tiga bulan bermula selepas luputnya tempoh 21 hari dari tarikh rekuisisi, maka notis adalah dalam tempoh masa tiga bulan berkenaan. Bagaimanapun, sekiranya ia mula berjalan dari tarikh rekuisisi dibuat, notis sudah terkeluar dari masa tiga bulan tersebut. Yang arif Pesuruhjaya Kehakiman ('PK') memutuskan bahawa pemanggilan sesuatu EGM harus bermula dari tarikh rekuisisi dibuat, dan dengan itu mengisytiharkan notis sebagai batal dan tak sah ('perintah terdahulu'). Namun, apabila defendan memohon lanjutan masa bagi mengadakan EGM dan untuk mengesahkan notis, PK telah membenarkan permohonan tersebut ('perintah terkemudian'). Akibatnya adalah rayuan-rayuan di sini. Rayuan no. P-02-656-2002 adalah rayuan defendan terhadap perintah terdahulu PK. Defendan bagaimanapun tidak meneruskan rayuannya di mahkamah semasa. Rayuan no. P-02-597-2002 adalah rayuan plaintif-plaintif terhadap perintah terkemudian. Keputusan mahkamah semasa adalah berkaitan dengan rayuan terkemudian tersebut oleh plaintif-plaintif.

Diputuskan (membenarkan rayuan)
Oleh Mokhtar Sidin HMR (majoriti):

[1] Sebaik sahaja mahkamah yang mempunyai bidang kuasa tidak terhad membuat keputusan, sama ada keputusan itu berbentuk substantif ataupun prosedur, maka ianya hendaklah dipatuhi dan tidak harus dibuka semula kecuali keputusan itu jelas salah, batal dan tak sah.

[2] PK telah mengisytiharkan notis sebagai batal dan tak sah. Perisytiharan tersebut adalah spesifik. Walaupun begitu, defendan masih memfail permohonan di mahkamah yang sama bagi lanjutan masa dan untuk deklarasi bahawa notis adalah sah dan berkesan. Oleh yang demikian, relif utama yang dipohon defendan adalah supaya notis diisytiharkan sah dan berkesan, kerana tanpa notis yang sah dan berkesan tiada asas bagi sebarang perlanjutan masa. Ini terang-terang menyanggahi perintah terdahulu yang diberi. Perintah terdahulu hanya boleh diakas melalui rayuan ke mahkamah yang lebih tinggi dan bukan melalui suatu permohonan ke mahkamah yang sama kerana tiada apa pun yang tidak sah mengenainya. PK dalam membuat perintah terdahulu mempunyai bidang kuasa untuk berbuat demikian. Dengan itu plaintif-plaintif berhak membantah permohonan defendan untuk lanjutan masa atas alasan bahawa mahkamah sudah *functus officio* dan bahawa *res judicata* dan estopel terpakai. Selain itu, permohonan oleh defendan bagi lanjutan masa, yang merupakan cubaan untuk menghidupkan isu yang sudah diputuskan, adalah suatu salah guna proses mahkamah.

[3] PK silap dalam melaksanakan budi bicaranya di bawah s. 355(4) Akta membenarkan lanjutan masa kepada defendan berkaitan notis disebabkan perintah terdahulu yang mengisytiharkannya sebagai batal dan tak sah. Perkataan-perkataan "tidak boleh diadakan selepas luputnya tempoh tiga bulan dari tarikh tersebut" dalam s. 144(3) Akta adalah mandatori dan tidak tertakluk kepada sebarang perlanjutan masa.

[4] Tujuan EGM adalah untuk menyingkir beberapa pengarah sedia ada dan menggantikan mereka dengan pengarah-pengarah pilihan defendan. Suatu notis yang teratur dan sah baginya harus dikeluarkan kerana ia menjejaskan hak-hak pengarah terbabit yang dipilih dengan teratur pada AGM syarikat berkenaan. Oleh itu, proses dan prosedur bagi memanggil mesyuarat harus dipatuhi sepenuhnya. Sebarang kecacatan pada proses atau prosedur tersebut tidak boleh dipulih di bawah s. 355 Akta. Dalam kes semasa, bukan sahaja notis tersebut cacat disebabkan EGM yang hendak diadakan itu melampaui masa tiga bulan yang dihadkan, ianya juga telah diisytiharkan sebagai batal dan tak sah. Bagaimanapun, tiada apa-apa yang boleh menghalang defendan dari membuat rekuisisi baru untuk mengadakan EGM di mana, jika plaintif-plaintif gagal untuk mengadakan EGM, defendan boleh mengeluarkan notis yang sah dan teratur untuk mengadakan mesyuarat tersebut.

[5] Kuasa budi bicara di bawah s. 355 Akta bukanlah mutlak. Ia hendaklah dilaksanakan secara kehakiman dan keadilan kes harus dipertimbangkan dengan semasak-masaknya. Walaupun terdapat rayuan terhadap perintah terdahulu, defendan tidak meneruskannya. Oleh itu, perintah terdahulu masih berkuatkuasa dan berkesan. PK tidak seharusnya membuat perintah terkemudian yang secara berkesannya telah membatalkan perintah terdahulu.

[6] Tidak ada halangan bagi pemegang-pemegang saham berkaitan jumlah rekuisisi yang boleh dibuat. Apabila defendan diberitahu bahawa pemanggilan mesyuarat seperti yang tertera di dalam notis adalah tidak teratur, defendan dengan mudah boleh menyerahkan suatu rekuisisi lain kepada plaintif-plaintif. Defendan boleh memohon kepada mahkamah untuk mengadakan mesyuarat di bawah s. 150 Akta.

[7] Tiada alasan untuk menyalahkan plaintif-plaintif kerana gagal mengadakan EGM kerana mereka membantah penyingkiran pengarah-pengarah yang dipilih di AGM terdahulu. Lagipun, kegagalan plaintif-plaintif untuk membekalkan senarai pemegang saham kepada defendan langsung tidak menjejaskan hak defendan untuk memanggil EGM dalam tempoh yang

ditetapkan. Di bawah s. 144(3) Akta, tiada keperluan supaya senarai penuh pemegang saham dibekalkan sebelum EGM boleh dipanggil oleh defendan. Membangkitkan kegagalan plaintif-plaintif membekalkan senarai pemegang saham hanyalah helah defendan bagi menjustifikasikan permohonan lanjutan masanya.

Oleh Abdul Aziz Mohamad HMR (menentang):

[1] Sebenarnya, perintah terdahulu sepatutnya menjadi perintah provisional, iaitu suatu perintah yang mengisytiharkan notis tidak sah berdasarkan halkeadaan yang wujud ketika itu dan tertakluk kepada pembenaran lanjutan masa, di mana, jika dan apabila ianya dibenarkan, akan mengesahkan notis. Oleh itu, halkeadaan kes tidak mewajarkan pemakaian prinsip *functus officio* mahupun *res judicata.*

[2] Tiada sebab mengapa tempoh masa di bawah s. 144(3) Akta tidak boleh dilanjutkan oleh mahkamah di mana wajar, sepertimana kesnya di sini, di mana plaintif-plaintif sendiri bertanggungjawab menyebabkan defendan gagal mematuhi had masa. Mengambilkira s. 355(4) Akta, perkataan-perkataan jelas dan nyata adalah perlu bagi menghalang tempoh masa di dalam s. 144(3) itu daripada dilanjutkan.

[3] Terdapat banyak keterangan di hadapan PK bahawa taktik melengah-lengah oleh plaintif-plaintif dan kegagalan mereka untuk bersetuju membekalkan salinan senarai pemegang saham kepada defendan telah menyebabkan defendan tidak berupaya mematuhi had masa yang ditetapkan dalam s. 144(3) Akta. Defendan telah mengambil langkah serta merta bagi mendapatkan senarai pemegang saham dengan janji untuk menanggung kosnya. Bahawa defendan tidak bertanya berapa jumlah yang harus dibayar bukanlah sesuatu yang material. Pendaftar-pendaftar saham, jika mereka berhasrat untuk memenuhi permintaan defendan, boleh menjawab bahawa senarai akan dibekalkan sebaik sahaja suatu jumlah kos dibayar.]

Case(s) referred to:

Badiaddin Mohd Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Dato' Hamzah Abdul Majid & Anor v. Wimbley Industries Holdings Bhd [1998] 4 CLJ Supp 471 HC ***(refd)***

First Nominee (Pte) Ltd v. New Kok Ann Realty Sdn Bhd & Anor [1983] 2 MLJ 76 ***(refd)***

Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104 CA ***(refd)***

Nyuk Fung & Ors v. Pan Global Equities Bhd [1991] 1 CLJ 452; [1991] 1 CLJ (Rep) 406 SC ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 132E(1), (2), (3), (4), (5), 143, 144(1), (3), 150, 355(4)
Contracts Act 1950, s. 66

(Civil Appeal No: P-02-656-2002)
For the appellant/defendant - Loh Siew Cheang (Rajashree Suppiah & Abdullah Abdul Rahman); M/s Cheang & Ariff
For the respondents/plaintiffs - Mahinder Singh Dulku (A Nedu Maran); M/s Mahinder Singh Dulku & Co

(Civil Appeal No: P-02-597-2002)
For the appellants/plaintiffs - Mahinder Singh Dulku (A Nedu Maran); M/s Mahinder Singh Dulku & Co
For the respondent/defendant - Loh Siew Cheang (Rajashree Suppiah & Abdullah Abdul Rahman); M/s Cheang & Ariff

Reported by Usha Thiagarajah

JUDGMENT

Mokhtar Sidin JCA:
The two appeals were fixed to be heard together. Although they appeared to be inter-related, they are two distinct appeals. The first appeal is by HLB Nominees (Tempatan) Sdn Bhd in respect of Originating Motion No. 24-1259-2002 filed by the respondents, SJA Berhad and Tan Hock Lai @ Tan Hock Chan, in the High Court of Malaya at Pulau Pinang. The appeal is in respect of the interpretation of s. 144(1) of the Companies Act. The second appeal arose from the same application but on an entirely different issue. In the second appeal the appellants are the applicants in that originating motion. The facts and the background of both appeals are stated below and to avoid any confusion I will refer to the parties as they were in the court below.

On 22 April 2002, HLB Nominees (Tempatan) Sdn Bhd (the defendant in the originating summons) deposited with SJA Berhad (the first plaintiff) a requisition for an extraordinary general meeting (EGM) together with a special notice of intended resolutions to remove a number of named directors of SJA Berhad including Tan Hock Lai @ Tan Hock Chan (the second plaintiff) and to appoint two named persons as independent and non-executive directors pursuant to s. 144(1) of the Companies Act 1965 (hereinafter referred to as "the Act"). The directors of the first plaintiff did not take any step to act on the requisition and as a result of that the defendant on 9 July 2002, pursuant to s. 144(3) of the Act, issued a notice for an EGM to be held on 7 August 2002 (hereinafter referred to as "the notice"). On 24 July 2002, the plaintiffs filed the Originating Motion No. 24-1259-2002 at the Penang High Court to restrain the defendant from holding the EGM on 7 August 2002 on the ground

that under s. 144(3) of the Act the time to hold the meeting had lapsed. The originating summons seeks the court's determination or directions on the following questions:

1. whether on a proper construction of section 144(3) of the Companies Act 1965 the time for calculating the three months for convening the relevant Extra Ordinary General Meeting stipulated in the said section runs from the date of the deposit of the relevant requisition or from the expiry of 21 days of the date of the deposit of the said requisition;

2. whether on a proper construction of section 144(3) of the Companies Act 1965, the Defendant's solicitor's notice dated 09.07.2002, indicating the Defendant's intention to hold an Extra Ordinary General Meeting of the 1st Plaintiff on 07.08.2002 is in contravention of the time limits prescribed by the aforesaid section and therefore null and void;

In the event this Honourable Court is of the opinion that the Defendant's intention to convene the Extra Ordinary General Meeting of the 1st Plaintiff on 07.08.2002 is out of time and in contravention of the time limits prescribed by Section 144(3) of the Companies Act 1965, the Plaintiffs pray for the following reliefs:

(a) a declaration that the Defendant's solicitor's notice dated 09.07.2002 notifying the Board of Directors of the 1st Plaintiff and the shareholders of the 1st Plaintiff, informing them that the Defendant intends to hold an Extra Ordinary Meeting of the 1st Plaintiff on 07.08.2002 at Sri Mas 2 & 3, The City Bayview Hotel, 25-A Farquhar Street, 10200 Penang is null and void and of no effect, and

(b) in the meantime an interlocutory injunction restraining the Defendant whether by itself or by its servants or agents or otherwise howsoever from holding the Extra Ordinary General Meeting of the 1st Plaintiff on 07.08.2002 at Sri Mas 2 & 3, The City Bayview Hotel, 25-A Farquhar Street, 10200 Penang until the final determination of the proceedings herein or until further order of this Honourable Court;

The learned Judicial Commissioner heard the application and on 29 July 2002, she allowed the application whereby she made the following order (the first order):

a …. MAHKAMAH DENGAN INI DIPERINTAHKAN:

(a) bahawa **notis Peguamcara Defendan bertarikh 09.07.2002** yang memberitahu Lembaga Pengarah-pengarah Plaintif Pertama dan pemegang-pemegang saham Plaintif Pertama, yang memberitahu mereka bahawa Defendan berniat untuk mengadakan satu Mesyuarat Am Luarbiasa Plaintif b Pertama pada 07.08.2002 di Sri Mas 2 & 3, The City Bayview Hotel, 25-A Lebuh Farquhar, 10200 Pulau Pinang dengan ini **adalah diisytiharkan tidak sah dan terbatal dan tidak berkesan;** (emphasis added).

My understanding of the above is that, the defendant's solicitor's notice dated c 9 July 2002 informing the plaintiffs and the other shareholders of the first plaintiff that an EGM which was to be held on 7 August 2002 at Sri Mas 2 & 3, The City Bayview Hotel, 25-A Farquhar Street, Penang had been declared by the court to be null and void.

d It was the contention of the plaintiffs that the notice had been declared null and void and of no effect. That order is final and for all intents and purposes the notice is a worthless piece of paper. Any subsequent application by the defendant for an order to extend the time and to validate the notice would be of no effect in view of that order. That order is the subject matter of the first appeal filed by the defendant. The second appeal arose from an application e by the defendant for enlargement of time to hold the EGM and to validate the notice which already had been declared null and void and of no effect by the same court on 29 July 2002. The court on 5 August 2002 allowed the application. The plaintiffs now appeal against that decision which is the second appeal.

f In respect of the first appeal, it is common ground that the defendant had on 22 April 2002 deposited a requisition with the 1st plaintiff to convene an EGM to remove certain directors of the 1st plaintiff. The requisition was made under s. 144 of the Companies Act 1965. Section 144 provides:

g 144 Convening of extraordinary general meeting on requisition

(1) The directors of a company, notwithstanding anything in its articles, shall on the requisition of members holding at the date of the deposit of the requisition not less than one-tenth of such of the paid-up capital as at the date of the deposit carries the right of voting at general meetings or, in the case of h a company not having a share capital, of members representing not ness than one-tenth of the total voting rights of all members having at that date a right to vote at general meetings, forthwith proceed duly to convene an extraordinary general meeting of the company to be held as soon as practicable but in any case not later than two months after the receipt by the company of the requisition.

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(2) The requisition shall state the objects of the meeting and shall be signed by the requisitionists and deposited at the registered office of the company, and may consist of several documents in like form each signed by one or more requisitionists.

(3) If the directors do not within twenty-one days after the date of the deposit of the requisition proceed to convene a meeting the requisitionists, or any of them representing more than one-half of the total voting rights of all of them, may themselves, in the same manner as nearly as possible as that in which meetings are to be convened by directors convene a meeting, but any meeting so convened shall not be held after the expiration of three months from that date.

The plaintiffs, by way of an originating motion applied to strike out the notice on the ground that the date for holding the meeting as stated in the notice exceeded the three months provided by s. 144(3) and for that reason the notice is null and void. The learned Judicial Commissioner in allowing the application and declaring the notice to be null and void, stated in her judgment:

In my considered opinion the words "from that date" are not doubtful nor ambiguous. This is because the word "that" which appears in between the word "from" and the word "date" is given, inter alia, the following meaning by *The Concise Oxford Dictionary*, Ninth edition, on page 1444:

1 designating the person or thing, indicated, named, understood, etc. (look at that dog; what was that noise?)

It would follow, therefore, that when the legislature enacted the two concluding words of s. 144(3) of the Act, i.e. "that date" it must be taken to have intended the cumulative effect of the two words to mean something which is indicated, named and understood, to wit, "the date of the deposit of the requisition". These words are found in s. 144(3) of the Act and also in s. 144(1) of the Act. In my judgment if the legislature had intended to give a different meaning to the concluding word "date" in s. 144(3) of the Act it would not have used the preceding word "that" to describe or refer to the word "date".

The court's view is fortified by the legislature's choice of the concluding words in s. 144(1) of the Act, to wit, "but in any case not later than two months after the receipt by the company of the requisition" which clearly differ from those in s. 144(3) of the Act, to wit "but any meeting so convened shall not be held after the expiration of three months from that date".

The distinction is warranted because under s. 144(1) of the Act it is the directors who convene the EGM and it is only reasonable and logical that time should only run from the date the company receives the requisition deposited by the requisitionists whereas under s. 144(3) of the Act, it is the requisitionists who convene the meeting and therefore, it is only reasonable and logical that time should run from the date they deposit the requisition which date is a fact within their special knowledge.

The construction adopted by the court is also fortified by the following excerpt taken from *Halsbury's Law of England*, Fourth Edition, Volume 7(1), on page 496:

> 698 Requisition for meeting.
>
> …
>
> If the directors do not within 21 days from the date of the deposit of the requisition proceed duly to convene a meeting, the requisitionists, or any of them representing more than one-half of the total voting rights of all of them, may themselves convene a meeting. The notice convening the meeting need not state the statutory authority under which it is convened, nor it is necessary for the notice to be signed by all the requisitionists provided documents accompanying the notice clearly indicate that the meeting is in fact being called by all of them; **but any meeting so convened must not be held after the expiration of three months from the date of deposit of the requisition**. (emphasis added)

The section in the English Companies Act 1985 which is equivalent to s. 144(3) of the Act is s. 368(4). The subsection provides as follows:

> If the directors do not within 21 days from the date of the deposit of the requisition proceed duly to convene a meeting, the requisitionists, or any of them representing more than one half of the total voting rights of all of them, may themselves convene a meeting, but any meeting so convened shall not be held after the expiration of 3 months from that date.

…

As stated earlier, there is a distinction between the time prescribed in s. 144(1) and that in s. 144(3) of the Act for the holding of the EGM.

Where the directors themselves convene the EGM the EGM must be held within 2 months from the date of the receipt of the requisition. However, where the requisitionists or any of them representing more than one-half of the total voting rights of all of them convenes the EGM the EGM must be held within 3 months from the date of the deposit of the requisition. This means that when the requisitionists or any of them who qualifies to do so convenes the EGM

they or he is given another month to do so in order to take into account the period of 21 days which is given to the directors to convene the EGM. It is only after the expiration of the 21 days without the directors convening the EGM that the shareholders or members concerned can themselves proceed to convene the EGM.

In the instant case since the requisition was received by the 1st plaintiff on 22nd April 2002, the EGM should have been convened and held at the latest on 22nd June 2002 by the directors. However, since the directors of the 1st plaintiff did not, between 22nd April 2002 and 13th May 2002, issue any notice calling for an EGM then pursuant to s. 144(3) of the Act starting from 14th May 2002 onwards the defendant is entitled to issue a notice calling for an EGM which should have been held at the latest on 22nd July 2002.

Further down in her judgment the learned Judicial Commissioner stated:

The court is in agreement with Dato' Mahinder Singh Dulku that in view of the words "shall not be held" in the concluding phrase of s. 144(3) of the Act, i.e. "but any meeting so convened shall not be held after the expiration of three (3) months from that date" the negative provision is a mandatory one and not merely a directory one. Consequently, the court cannot allow the defendant's solicitors' notice dated 9th July 2002 convening the meeting to be held on 7th August 2002 to remain operative since 7th August 2002 was clearly outside the three (3) months period provided and intended by the Legislature when enacting s. 144(3) of the Act.

The reason is because where a statute requires an act to be done within a particular time, the question arises whether the validity of the act is affected in a failure to comply with what is prescribed.

The following excerpt taken from *Halsbury's Laws of England*, Fourth edition, Volume 44, para 933 is relevant:

933 Mandatory and directory enactments

...

If it appears that Parliament intended disobedience to render the act invalid, the provision in question is described as "mandatory", "absolute", "imperative" or "obligatory"; if, on the other hand, compliance was not intended to govern the validity of what is done, the provision is said to be "directory".

No universal rule can be laid down for determining whether provisions are mandatory or directory; in each case the intention of the legislature must be ascertained by looking at the whole scope of the statue and, in particular, at the importance of the provision in question in relating to the general object to be secured. Thus it is not possible to generalize by reference to the nature of what is prescribed. *No great reliance can*

> *be placed, either, on the suggestion that provisions framed purely in affirmative language are normally construed as directory, although the converse proposition, that negative provisions are prima facie mandatory, would seem on principle to be less open to criticism.* (emphasis added)

In the case of *Dato' Hamzah Abdul Majid & Anor v. Wembley Industries Holdings Berhad* [1998] 4 CLJ Supp 471 at p. 474, para g onwards Abdul Aziz Mohamad J, (as His Lordship then was) observed as follows in respect of the effect of s. 144(3) of the Act:

> The position is different under sub-s.(3). There, it is expressly stated that a meeting convened by the requisitionists themselves "shall not be held after the expiration of three months" from the date the requisition is deposited. The sub-section forbids the holding of the meeting itself after the three months. I am able to discern a rationale for that. As I said, sub-s.(3) gives the requisitionists the right of self-help, and, as stated in *Re Ariadne Australia Ltd*, 2 ACLR 791, at p. 794, it is "to cloak the requisitionists with the power to act in place of the directors where the directors are refusing to call a meeting of shareholders which they are obliged to call". The rationale has to do with the maintenance of good order in a company. If the right of the requisitionists to themselves convene a meeting is viewed as a legally-sanctioned usurpation of the role of the established power, namely the directors, in order to achieve what the requisitionists themselves want, it is understandably desirable that, the power now being in their hands to achieve it, they must not dally in achieving it. The state of usurpation must not be allowed to go on for longer than is necessary. Thus the meeting that they convene must not be allowed to be held after the three months.

The court also agrees with Dato' Mahinder Singh Dulku that before the court can exercise the discretion conferred upon it by s. 355(4) of the Act to enlarge the time for the holding of the EGM outside the three (3) months period stipulated in s. 144(3) of the Act there must be a proper application before the court and that the defendant cannot apply for enlargement of time simply by way of an oral application and a statement in para 28 of its affidavit-in-reply at enclosure 4 to oppose the plaintiffs' application.

In my judgment, although the court agrees with Mr. Loh Siew Cheang following the case of *Lim Hean Pin v. Thean Seng Co. Sdn Bhd & Others* [1992] 2 MLJ 10 at page 33 that s. 355(3) of the Act empowers the court to make a validation order in respect of proceedings at company meetings provided no injustice is done to the company or to any member or creditors thereof the court has no judicial discretion to validate the notice convening the meeting because the validation that is really required is essentially of the EGM to be held on 7th August 2002 because the event i.e. the EGM had not taken place yet. It follows, therefore, that s. 355(3) of the Act is inapplicable

because there is nothing at this stage of the proceedings for the court to validate since the EGM being a future event has yet to be held at the time of the hearing of the application. (See the Supreme Court case of *See Nyuk Fung & Ors v. Pan Global Equities Bhd* [1991] 1 MLJ 152).

Consequently, the court declared the notice to be null and void and of no effect, granted an interim injunction to restrain the defendant from holding the EGM on 7th August 2002 until the final determination of the proceedings or until further order of the court, ordered the defendant to bear the costs of the proceedings and for damages to be assessed by the Senior Assistant Registrar and paid to the plaintiffs by the defendant.

Nevertheless, in view of the obstructive and delaying acts of the defaulting directors, the court gave liberty to the defendant to apply formally for enlargement of time by ruling that there was nothing to stop the defendant from making a proper application for enlargement of time if it so chooses to do so subsequently and that the interlocutory injunction granted by the court will remain effective until further order of the court.

It is against this decision that the defendant appealed (the first appeal). It is necessary for me to go into the judgment of the learned Judicial Commissioner at length because not only there was an appeal against that decision but as a result of what had been stated in the judgment, the defendant by way of summons-in-chambers dated 31 July 2002 applied for enlargement of time to hold the meeting at the time and place as stated in the notice. Despite objections by the plaintiffs, the learned Judicial Commissioner on 5 August 2002 allowed the application. Against that decision the plaintiffs appealed (the second appeal).

The issue in the first appeal, as can be seen from the judgment above, is the interpretation of the words "shall not be held after the expiration of three months from that date" found in subsection (3) of s. 144. The plaintiffs submitted that three months from that date meant three months from the date of depositing the requisition. The defendant submitted that the three months was from the expiry of 21 days after depositing the requisition notice. The Judicial Commissioner agreed with the plaintiffs that the words "three month from that date" mean three months from the date of depositing the requisition. The learned Judicial Commissioner held that the date to hold the meeting on 7 August 2002 as stated in the notice exceeded the three months and she then declared the notice to be null and void and of no effect. Before us, the learned counsel for the defendant did not pursue the appeal and for that reason we dismissed the appeal.

The second appeal arose from the application by the defendant by way of summons-in-chambers for enlargement of time to hold the EGM. Apparently, the defendant made the application after hearing the judgment of the learned Judicial Commissioner. The application was heard by the same Judicial Commissioner on 5 August 2002, two days before the date of the meeting as stated in the notice. In the summons-in-chambers the defendant sought, *inter alia*, the following relief:

> 1. That the time for holding an Extraordinary General Meeting by the Defendant pursuant Section 144(3) of the Companies Act, 1965 ("the Act") ("EGM") be enlarged from the 22.7.2002 to 7.8.2002 pursuant to s. 355 and s. 355(4) in particular, of the Act and further to rectify, cause to be rectified, to negative or modify or cause to be modified the consequences in law of any omission defect error or irregularity caused by the contravention of s. 144(3) of the Act and to validate any act or proceedings in connection to the Notice of EGM dated 9.7.2002 for the EGM to be held on 7.8.2002 pursuant to s355(3) of the Act;
>
> 2. That upon an order being granted under prayer 1, the Defendant's Notice of EGM dated 9.7.2002 be declared valid and effective;

The plaintiffs objected to the application in view of the learned Judicial Commissioner's earlier decision declaring the notice to be null and void. Despite this objection the learned Judicial Commissioner allowed the application. Being unhappy with that decision the plaintiffs appealed, which is the second appeal. That is the appeal before us now.

The learned counsel for the plaintiffs submitted that in the earlier application by the plaintiffs, the plaintiffs sought a declaration that the notice is null and void because the holding of the meeting as stated in the notice exceeded the three months from the date the requisition was deposited and s. 144(3) forbids the holding of such a meeting. The learned Judicial Commissioner after hearing the parties declared that the notice is null and void and of no effect. The defendant did not proceed with the appeal against that decision and for all intents and purposes that order is still effective and binding on all parties. When the defendant made the present application for enlargement of time and a declaration that the notice is valid and effective, the first order is still effective. There was no stay in respect of that order. The plaintiffs' counsel submitted that on the date when the defendant applied to enlarge the time for the meeting to be held as stated in the notice, the notice is not in existence any more as it has been declared null and void and of no effect by the earlier decision. It was the same when the learned Judicial Commissioner heard the application. The defendant and the learned Judicial Commissioner should have known about the first order because the defendant was a party to the

proceedings and the learned Judicial Commissioner was the one who gave the order. When the Judicial Commissioner heard the application by the defendant, the learned Judicial Commissioner was *functus officio* in making a second order, worst of all it contradicted the first order. The effect of the second order is that the notice which she had declared on 29 July 2002 to be null and void is now being declared to be valid and effective. It was the contention of the plaintiffs' counsel that the learned Judicial Commissioner was *functus officio* in making the second order. The second order dated 5 August 2002 stated as follows:

> … MAHKAMAH DENGAN INI MEMERINTAHKAN SEPERTI BERIKUT:
>
> (1) bahawa tempoh masa untuk mengadakan suatu Mesyuarat Agung Luarbiasa oleh Defendan di bawah Seksyen 144(3) Akta Syarikat, 1965 ("Akta") ("EGM") dilanjutkan dari 22.7.2002 kepada 07.8.2002 menurut s. 355 khususnya s. 355(4), Akta tersebut dan selanjutnya mana-mana ketidakpatuhan, kecacatan atau kesilapan atau irregularity yang terhasil oleh kebertentangan terhadap s. 144(3) Akta tersebut dibetulkan atau dijadikan betul atau dinegatifkan atau dimodifikasi atau dijadikan dimodifikasi akibat undang-undangnya dan bahawa mana-mana tindakan atau prosiding yang diambil berkaitan dengan Notis EGM bertarikh 9.7.2002 untuk EGM yang akan diadakan pada 7.8.2002 disahkan di bawah s. 355(3) Akta tersebut;
>
> (2) **bahawa Notis EGM Defendan bertarikh 9.7.2002 adalah dan dengan ini diisytiharkan sah dan berkesan;**
>
> (3) bahawa perintah injunksi interim interlokutori yang diberikan pada 29.7.2002 adalah dan dengan ini diketepikan; …
>
> (emphasis added).

The learned counsel for the plaintiffs contended that the learned Judicial Commissioner has no jurisdiction to make the second order when the first order is still subsisting and effective. He cited the decision of *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* [1997] 2 CLJ 104, a decision of this court. In that case the appellants and the respondent were parties to several agreements, each of which contained an arbitration clause. Disputes arose between the parties whereupon the parties agreed to refer the disputes to arbitration. By an award dated 8 December 1992, the arbitrator found for the appellants on the issue of liability in respect of some heads of claim. However, he declined to assess the quantum on the ground that he was not authorized to do so. Being dissatisfied with that, the appellants made representations to the arbitrator. On 13 May 1992, the arbitrator wrote conceding that he was mistaken in his view and fixed dates of hearing to assess the quantum. In the meantime, on 5 February 1993, the respondent filed an application to set aside the award of 8 December 1992. On 30 July 1993, the appellants took out a

notice of motion claiming, *inter alia*, for the following relief: (1) a declaration that the arbitrator's award was an interim award on liability only; (ii) a declaration that the arbitrator was seized of jurisdiction to complete the reference to arbitration in respect of the quantum; (iii) an order that the arbitrator's award be remitted for amendment to reflect (i) and (ii) above. Following that, on 23 September 1993, the respondent took out a notice of motion in which it claimed an injunction restraining the arbitrator from conducting any further proceedings until further order. When both applications came up for hearing, counsel for the respondent raised a preliminary objection that the appellants had adopted the wrong procedure, in that the appellants had failed to apply for declarations by originating summons or writ, and to adopt the specific procedure as prescribed by Parliament in seeking their relief. The respondent complained further that the respondent's application preceded that of the appellants', and that the appellants should not be permitted to attempt a remission of the award through an unauthorized entry. The judge came to the conclusion that the forum chosen by the appellants was not irregular, and ruled in favour of the appellants (the first decision). He then adjourned the hearing to another date in respect of its merits. The respondent's application was not heard because the appellants gave an undertaking not to proceed further with the arbitration. When the appellants' motion came up for hearing on its merits, counsel for the respondent invited the court to reopen its earlier procedural ruling. The judge acceded to this request, heard arguments afresh and reversed his earlier decision, whereupon the preliminary objection was upheld and dismissed the appellants' application (the second decision). The appellants appealed. It was held:

(1) Once a judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be reopened. Although the first decision was made on an interlocutory matter which was purely procedural in nature, it was nevertheless binding on the court and on all parties to the *lis* until its reversal on appeal. The decision of the judge overruling the respondent's preliminary objection rendered the point taken res judicata (see pp 65G and 66H); *Government of Malaysia v. Dato Chong Kok Lim* [1973] 2 MLJ 74 followed and *Harrison v. Harrison* [1955] 1 Ch 260 distinguished.

(2) A failure to adhere to the principle of res judicata may lead to chaos in the conduct of civil proceedings. In this case, on the assumption of the law made by counsel before the court, there would have been no bar to the judge to re-review his second decision reversing himself. The process could then be repeated ad infinitum with no conclusion.

Gopal Sri Ram JCA, delivering the judgment of the court, at pp. 113-115 said:

> But, as we have earlier said, we choose to decide this appeal on quite a different basis. It is this. The learned judge, on 13 October 1993, was faced with an objection as to the form of proceedings which had been adopted by the appellants. He came to the conclusion that the form chosen by the appellants was not irregular. Although that was a decision made on an interlocutory matter which was purely procedural in nature it was nevertheless binding on the court and on all parties to the lis until its reversal in appeal. In our judgment the decision of the learned judge overruling the respondent's preliminary objection rendered the point taken *res judicata.*
>
> If authority is needed for the proposition which has commended itself to us, it is to be found in *Government of Malaysia v. Dato Chong Kok Lim* [1973] 2 MLJ 74 which was drawn to the attention of counsel during argument and in which there appears the following passage in the judgment of Sharma J (at p 76):
>
> > In *Satyadhyan Ghosel & Ors v. Sint Deorajin Dobt and another* AIR [1960] SC 941, the statement of the law on the subject is given thus:
> >
> > > The principle of *res judicata* is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall be not adjudged again. Primarily it applies as between past litigation and future litigation. When a matter – whether on a question of fact or a question of law – has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of res judicata is embodied in relation to suits in s. 11 of the Code of Civil Procedure; but even where s. 11 does not apply, the principle of *res judicata* has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct.
> >
> > > *The principle of res judicata applies also as between two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings.*

> A decision given by a court at one stage on a particular matter or issue is binding on it at a later stage in the same suit or in a subsequent suit. (See *Peareth v. Marriott* [1883] 22 Ch C 182, *Hook v. Administrator-General of Bengal & Ors* LR 48 IA 187 and *Re Trusts of the Will of Tan Tye (Deceased) Yap Liang Neo v. Tan Yew Ghee and Another* [1936] MLJ 141 at pp 147-151). Parties cannot raise a second time in the same suit an issue that has already been determined either expressly or by necessary implication. (See *Louis Dreyfus v. Aruna Chalayya* LR 58 IA 381).

A failure to adhere to the principle expressed in the judgment of Sharma J just quoted may lead to chaos in the conduct of civil proceedings. The facts of this very case afford a good illustration of such a consequence. We have here an earlier decision by the judge upon a procedural issue determining it in the appellants' favour. Then along comes the respondent at the adjourned hearing and applies to the judge to reopen the issue and review his earlier decision. The judge obliged and reversed himself. What was there to prevent the appellants from then an application to the judge to re-review his decision reversing himself? On the assumption of the law made by counsel before us, there would have been no bar to the judge undertaking such an exercise. The process could then be repeated *ad infinitum* with no conclusion. It would be a circular tail chasing exercise with no forward movement, proving to the man on the street that the maxim 'the law is an ass' is not without content. The absurd results that would ensue in accepting the contention of counsel demonstrates the inaccuracy of the proposition advanced.

We cannot over emphasize the proposition that once a judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be reopened willy-nilly. One may then ask: how is this approach to be reconciled with the decision in Harrison? The answer to that question lies in recognizing that the principle for which that case is authority applies only where it is demonstrated that the court plainly lacked jurisdiction to make the order complained of: provided, of course, that the order in question has not been drawn up and perfected. To extend the scope of that principle would be to effectively demolish the requirements of certainty and finality which are the two pillars on which the judicial process rests.

The learned counsel for the plaintiffs also cited the case of *Badiaddin bin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75. In that case the appellants were the registered co-owners of a piece of Malay Reservation land ("the land"). Their business associate, Ismail, was in need of funds and as a result the appellants agreed to assist Ismail and they charged the land to the respondent. Ismail committed a breach of the facility given whereupon the respondent foreclosed the land and obtained an order of sale of the land. The appellants applied to the High Court for a declaration that

the charge as well as the order of sale were invalid as being in contravention of the Malay Reservations Enactment. On 21 March 1988, the High Court granted the declaratory order sought. On an application by the respondent in the same proceedings whereby s. 66 of the Contracts Act 1950 was invoked, the judge also made an order directing the appellants to repay all monies lent to Ismail (the first order). On 8 October 1990, the judge made another order declaring that the appellants had received an advantage or benefit directly from the respondent and for that reason the learned judge made an order of sale on the land and the proceeds of the sale be utilized to pay the balance outstanding on the loan made to Ismail (the second order). The appellants then commenced proceedings to have the second order declared null and void and to have it set aside on the ground that it contravened s. 13 of the Enactment. The appellants argued that they were entitled to the remedy *ex debitio justitiae* without the need to comply with the appeal procedure. The respondent argued that *res judicata* and estoppel precluded the appellants from questioning the validity of the second order. The judge held that it would be unjust to estop the appellants from challenging the second order by reference to *res judicata* or any other branch of the doctrine of estoppel because the second order was plainly invalid, it having been made in contravention of an express provision of written law (the third order). The respondent then appealed to the Court of Appeal which allowed the appeal on the sole ground that the High Court was *functus officio* and had no jurisdiction whatsoever to set aside the second order irrespective of any illegality in the order. On appeal to the Federal Court, the appeal was allowed. At pp. 92-93, Mohd Azmi, FCJ (as he then was) said:

> It is of course settled law as laid down by the Federal Court in *Hock Hua Bank*'s case that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one special exception to this rule (which was not in issue and therefore not discussed in *Hock Hua Bank*) is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction so as to bring the aggrieved party within the principle laid down by a number of authorities culminating in the Privy Council case of *Isaacs v. Robertson* [1985] AC 97 where Lord Diplock while rejecting the legal aspect of voidness and voidability in the orders made by a court of unlimited jurisdiction, upheld the existence of a category of orders of the court '… which a person affected by the order is entitled to apply to have set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity, and give to the judge a discretion as to the order he will make'.

The Privy Council through Lord Diplock also emphasized that the courts in England have not closed the door as to the type of defects in the final judgment of the court that can be brought into the category that attracts *ex debito justitiae* the right to have it set aside without going into the appeal procedure, 'save that specifically it includes orders that have been obtained in breach of rules of natural justice'. Similarly in this country, the statement of Abdoolcader J (as he then was) in *Eu Finance Bhd v. Lim Yoke Foo* [1982] 2 MLJ 37 at p 39 provides the correct guideline on the subject:

> The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon – in other words, it is subject to collateral attack. In collateral proceedings, the court may declare an act that purports to bind to be non-existent. In *Harkness v. Bells' Asbestos and Engineering Ltd* [1967] 2 QB 729, Lord Diplock LJ (now a Law Lord) said (at p 736) that 'it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside'.

For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court *ex debito justitiae* to a category of cases involving order which contravened 'any written law', the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception.

Peh Swee Chin, FCJ (as he then was) at p. 106 said:

> Whatever the labels used, the second order of sale was in substance and in truth the same as the order of sale of the said land which was set aside by the same court in the same originating summons shortly before the said previous order was made, notwithstanding the additional bit of alternative method of sale by 'private treaty' in addition to public auction. The same land was involved; there was the same purpose of the sale order for recovering the money due under the abortive charge. The second order of sale was a

resuscitation of the order of sale of the said land under the thinnest disguise which the same court had set aside earlier by its judgment given on 21 March 1988 in the same originating summons. The resuscitation in my view had the effect of invalidating or subverting the said judgment dated 21 March 1988 given on account of the said Enactment after hearing arguments and from which none of the parties had appealed.

In my view, with respect to all parties concerned, such resuscitation in these circumstances was an abuse of process of the kind for which this court ought not to fold its arms and do nothing about it.

I had considered and decided that the clear ratio in the *Hock Hua Bank*'s cases ought, on no account, to be departed from for dealing with this most unsatisfactory situation even though we were persuaded to do so on the ground of illegality on the argument based on the said Enactment. In other words, the said previous order should not be reopened and heard again on merits vide the ratio of *Hock Hua Bank v. Sahari bin Murid* after it was perfected and also on the ground of res judicata in any event. ….

Gopal Sri Ram, JCA in his judgment at pp. 112-113 said:

It is true, as a general rule, that orders of a court of unlimited jurisdiction may not be impugned on the ground that they are void in the sense that they may be ignored or disobeyed. The decision of the Judicial Committee of the Privy Council in *Isaacs v. Robertson* [1985] AC 97 affirms the existence of the rule. There, Lord Diplock when delivering the advice of the Board said (at pp. 102-103):

> Their Lordships would, however, take this opportunity to point out that in relation to orders of a court of unlimited jurisdiction it is misleading to seek to draw distinctions between orders that are 'void' in the sense that they can be ignored with impunity by those persons to whom they are addressed, and orders that are 'voidable' and may be enforced unless and until they are set aside. Dicta that refer to the possibility of there being such a distinction between orders to which the descriptions 'void' and 'voidable' respectively have been applied can be found in the opinions given by the Judicial Committee of the Privy Council in the appeals *Marsh v. Marsh* [1945] AC 271 at p 284 and *MacFoy v. United Africa Co Ltd* [1962] AC 152 at p 160; but in neither of those appeals nor in any other case to which counsel has been able to refer their Lordships has any order of a court of unlimited jurisdiction been held to fall into a category of court orders that can simply be ignored because they are *void ipso facto* without there being any need for proceedings to have them set aside. The cases that are referred to in these dicta do not support the proposition that there is any category of orders of a court of unlimited jurisdiction of this kind; what they do support is the quite different proposition that there is a category of orders of such a court

> which a person affected by the order is entitled to apply to have set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity and give to the judge a discretion as to the order he will make. The judges in the cases that have drawn the distinction between the two types of orders have cautiously refrained from seeking to lay down a comprehensive definition of defects that bring an order into the category that attracts *ex debito justitiae* the right to have it set aside, save that specifically it includes orders that have been obtained in breach of rules of natural justice.
>
> The contrasting legal concepts of voidness and voidability form part of the English law of contract. They are inapplicable to orders made by a court of unlimited jurisdiction in the course of contentious litigation. Such an order is either irregular or regular. If it is irregular, it can be set aside by the court that made it upon application to that court; if it is regular, it can only be set aside by an appellate court upon appeal if there is one to which an appeal lies.
>
> It is one thing to say that an order of a court of unlimited jurisdiction must be obeyed until it is set aside. It is quite a different thing to say that a court of unlimited jurisdiction may make orders in breach of written law. Of course, so long as an order of a court of unlimited jurisdiction stands, irregular though it may be, it must be respected. But where an order of such a court is made in breach of statute, it is made without jurisdiction and may therefore be declared void and set aside in proceedings brought for that purpose. It is then entirely open to the court, upon the illegality being clearly shown, to grant a declaration to the effect that the order is invalid and to have it set aside. It is wrong to assume that such an order may only be corrected on appeal.

The authorities cited above clearly show that once a court of unlimited jurisdiction makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be reopened unless that order is clearly illegal or null and void.

If it could be shown that the order made by the High Court is illegal or lack of jurisdiction then the party aggrieved by that order can apply to the same court or the court of concurrent jurisdiction to have the order be declared null and void without the necessity of appealing. This is the exception to the rule of *functus officio* as stated in *Badiaddin bin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd.*

The learned counsel for the plaintiffs submitted that the present appeal does not fall within the exception. There is nothing illegal about the first order and the defendant conceded that the first order was valid. As such the learned Judicial Commissioner was *functus officio* when she heard the application by the defendant for enlargement of time of the notice and then declared the notice to be valid and effective. For that reason, the learned counsel submitted that the second order given by the Judicial Commissioner is null and void and of no effect because of lack of jurisdiction. To this I agree.

The learned counsel for the plaintiffs also raised the issue of *res judicata*. As can be seen from the authorities we have cited, the doctrine of *res judicata* is based on the need of giving a finality to a judicial decision. Once a res is judicata, it should not be relitigated. When a court of competent jurisdiction made a decision on any matter, be that a question of fact or a question of law between two parties in any suit or proceeding, the decision given is final. The process to reverse or set aside that decision could only be done by way of an appeal to a higher court and certainly not by way of making an application to the same court to have that decision set aside or reversed. *Res judicata* also applies between two stages of the same litigation in that the court (whether the trial court or the higher court) having decided on an issue, the parties would not be allowed to relitigate the same issue at the subsequent stage of the same proceedings. *Res judicata* also applies to a decision given by a court on a particular issue when it would be binding on a proceeding at a later stage in the same suit or a subsequent suit in respect of that issue. Parties are not allowed to raise an issue in the same suit where the issue has already been determined either expressly or by implication. *Res judicata* is available to the party when the other party brings out an issue which has been determined by the court.

In the present appeal, when the defendant applied to enlarge the time to validate the notice beyond the three-month period, the plaintiffs objected to the application on the ground that the issue of the validity of the notice has been determined by the court on 29 July 2002. On the application by the plaintiffs, the court has declared the notice to be null and void for the reasons I have already stated earlier. The declaration made is specific in that the "notis bertarikh 9 July 2002 adalah diisytiharkan tidak sah dan terbatal dan tidak berkesan" (the notice dated 9 July 2002 is hereby declared to be null and void and of no effect). Despite this declaration, the defendant filed an application in the same court for enlargement of time and at the same time asking for a declaration that the notice is valid and effective. In my view, the principal relief sought by the defendant in this application is to have the notice declared valid and effective because without any valid or effective notice there could not be any enlargement of time. This is in direct contradiction to the earlier

order given on 29 July 2002. In my view, the application to enlarge the time is in actual fact only a guise to have the notice be declared valid and effective. This application is only a guise to set aside the order which declared the notice to be null and void given earlier. As pointed out earlier, that order could only be reversed by way of an appeal to a higher court, and not by way of making an application to the same court because there is nothing illegal in respect of the earlier order. The court in making the earlier order has the jurisdiction to do so. The plaintiffs are within their right to object to the application by the defendant for enlargement of time which in actual fact is an application to validate the notice on the ground that the court is *functus officio* and also *res judicata* and estoppel apply to the present application.

In my view, the present application by the defendant is an attempt to resuscitate an issue which has been decided earlier. As such it is an abuse of the process of the court as stated by Peh Swee Chin, FCJ (as he then was) in *Badiaddin bin Mohd Mahidin (supra)* where at p. 106 he said:

> Whatever the labels used, the second order of sale was in substance and in truth the same as the order of sale of the said land which was set aside by the same court in the same originating summons shortly before the said previous order was made, notwithstanding the additional bit of alternative method of sale by 'private treaty' in addition to public auction. The same land was involved; there was the same purpose of the sale order for recovering the money due under the abortive charge. The second order of sale was a resuscitation of the order of sale of the said land under the thinnest disguise which the same court had set aside earlier by its judgment given on 21 March 1988 in the same originating summons. The resuscitation in my view had the effect of invalidating or subverting the said judgment dated 21 March 1988 given on account of the said Enactment after hearing arguments and from which none of the parties had appealed.
>
> In my view, with respect to all parties concerned, such resuscitation in these circumstances was an abuse of process of the kind for which this court ought not to fold its arms and do nothing about it.
>
> I had considered and decided that the clear ratio in the *Hock Hua Bank*'s cases ought, on no account, to be departed from for dealing with this most unsatisfactory situation even though we were persuaded to do so on the ground of illegality on the argument based on the said Enactment. In other words, the said previous order should not be reopened and heard again on merits vide the ratio of *Hock Hua Bank v. Sahari bin Murid* after it was perfected and also on the ground of res judicata in any event. ….

In my view, the doctrine of *res judicata* and estoppel is applicable to the present application and therefore should be dismissed. The appeal is hereby allowed.

The learned Judicial Commissioner in allowing the present application stated that she has a discretion to do so under s. 355 of the Act. In her judgment, the learned Judicial Commissioner stated:

> Although s. 144(3) of the Companies Act 1965 ("the Act") has expressly made it mandatory for the EGM to be held before the expiration of three (3) months from the date of the deposit of the relevant requisition, in this case on 22nd April 2002, since the directors did not proceed to convene the EGM within the period of 21 days as stipulated in the subsection and there has been not only considerable delay on the part of the plaintiffs to consent to the supplying of a copy of the share register to the defendant which delay and failure have resulted in the inability of the defendant to comply with the time limit stipulated in s. 144(3) of the Act, the court can, in the exercise of the judicial discretion conferred upon it by s. 355(4) of the Act, enlarge the time prescribed for holding the EGM upon application by the defendant and upon being satisfied that the justice of the case requires that the defendant's application for enlargement of time be allowed. The court can do this even though the application is made after the period of three (3) months which is stipulated in s. 144(3) of the Act for the holding of the EGM has lapsed because of the clear wordings used by the legislature in s. 355(4) of the Act
>
> …
>
> In my judgment, having allowed the defendant's application for enlargement of time to hold the EGM on 7th August 2002 the court can further exercise the discretionary conferred upon it by s. 355(3) of the Act to validate the notice which the court had on 29th July 2002 ruled to be null and void and of no effect because of the irregularity in the date of the holding of the EGM, to wit, 7th August 2002, which is outside the three (3) months period by about two (2) weeks.

The plaintiffs' counsel submitted that s. 144(3) of the Companies Act is a substantive provision and any defect under that section could not be cured by s. 355 of the Act. For that reason the learned Judicial Commissioner was in error in exercising her discretion under s. 355 of the Act to enlarge the time and to validate the notice.

The facts as revealed in the evidence show that the defendant deposited a requisition to call for an EGM of the 1st plaintiff in order to remove some directors (including the 2nd plaintiff) from the Board of Directors of the 1st plaintiff. It was not disputed that both plaintiffs received the requisition notice and that the plaintiffs failed to comply with the requisition to call the EGM.

When the plaintiffs failed to call for the EGM within the stipulated period, the defendant should have called for the EGM pursuant to s. 144(3) of the Act within the timeframe given by s. 144(3).

The defendant made the present application to enlarge the time and to declare the notice as valid and effective. Apparently, the defendant in making the application made use of s. 355 of the Act which provides:

> 355 Irregularities in proceedings
>
> (1) No proceeding under this Act shall be invalidated by any defect irregularity or deficiency of notice or time unless the Court is of opinion that substantial injustice has been or may be caused thereby which cannot be remedied by any order of the Court.
>
> (2) The Court may if it thinks fit make an order declaring that the proceeding is valid notwithstanding any such defect irregularity or deficiency.
>
> (3) Without affecting the generality of subsection (1) and subsection (2) or of any other provision of this Act, where any omission defect error or irregularity (including the absence of a quorum at any meeting of the company or of the directors) has occurred in the management or administration of a company whereby any breach of this Act has occurred, or whereby there has been default in the observance of the memorandum or articles of the company or whereby any proceedings at or in connection with any meeting of the company or of the directors thereof or any assemblage purporting to be such a meeting have been rendered ineffective including the failure to make or lodge any declaration of solvency pursuant to section 257, the Court:
>
> (a) may, either of its own motion or on the application of any interested person, make such order as it thinks fit to rectify or cause to be rectified or to negative or modify or cause to be modified the consequences in law of any such omission defect error or irregularity, or to validate any act matter or thing rendered or alleged to have been rendered invalid by or as a result of any such omission defect error or irregularity;
>
> (b) shall before making any such order satisfy itself that such an order would not do injustice to the company or to any member or creditor thereof;
>
> (c) where any such order is made, may give such ancillary or consequential directions as it thinks fit; and
>
> (d) may determine what notice or summons is to be given to other persons of the intention to make any such application or of the intention to make such an order, and whether and how it would be given or served and whether it should be advertised in any newspaper.

(4) The Court (whether the company is in process of being wound up or not) may enlarge or abridge any time for doing any act or taking any proceeding allowed or limited by this Act upon such terms (if any) as the justice of the case may require any such enlargement may be ordered although the application for the same is not made until after the time originally allowed or limited.

In the court below, the defendant urged the Judicial Commissioner to exercise her discretion under s. 355(4) of the Act to enlarge the time and to validate the notice which had been declared null and void and of no effect. In my view, the Judicial Commissioner could not escape from having to declare the notice to be valid and effective. Otherwise the application for enlargement of time would be meaningless. Surprisingly, the Judicial Commissioner did not make any ruling in respect of the order given by her earlier on 29 July 2002. The defendant also did not ask for any ruling in respect of the earlier order which effectively declared the notice to be null and void and of no effect. With that declaration the plaintiffs' counsel contended that the notice became non-existent and the application for enlargement of time by the defendant should not have been allowed. It is also noted that the learned Judicial Commissioner did not mention the earlier order anywhere in her judgment in respect of the present application. In my view, she did this in order to avoid the thorny issue of having to make a ruling in respect of the earlier order given by her.

The learned counsel for the defendant submitted that the present application was filed taking the observation made by the learned Judicial Commissioner in her first judgment and she also stated that she had given liberty to the defendant to apply. The plaintiffs' counsel contended that no such liberty was given when the Judicial Commissioner made the earlier order. Perusing the order dated 29 July 2002, I could not find any liberty being given to the defendant. If there was such liberty given, certainly it would be stated in the said order. The liberty only appeared in the judgment. I tend to believe the plaintiffs' counsel that there was no liberty given when the first order was given because if it was given, the learned Judicial Commissioner would not make the order declaring the notice to be null and void since the defendant is given the opportunity to enlarge the time of the meeting to be held. Anyway, whether there is liberty given or not is not important for the purpose of this appeal.

Turning back to the exercise of discretion under s. 355(4) of the Act by the learned Judicial Commissioner, I am of the view that the learned Judicial Commissioner was in error in exercising her discretion to allow the defendant to enlarge the time in respect of the notice because she had earlier declared the notice to be null and void.

The learned counsel for the plaintiffs contended that enlargement or abridgement of time under s. 355 is not applicable to s. 144(3) because s. 144(3) is substantive and should be adhered to strictly. He cited the decision in *Dato' Hamzah Abdul Majid & Anor v. Wimbley Industries Holdings Bhd* [1998] 4 CLJ Supp 471. In that case some members of a company presented a requisition under s. 144(1) of the Company's Act to the company and the directors of the company to convene an extraordinary general meeting (EGM) of the company. The directors failed to convene the meeting within the stipulated period, but held it on 22 December 1997. The requisitionists, at the same time, did not exercise their right of self-help under s. 144(3) to convene the meeting within three months. At the meeting, the plaintiffs were removed as directors of the company. The plaintiffs then sought a declaration that the meeting was void for having been held after the three-month period and that the proceedings therein were of no effect. As such, they remained as directors of the company. My learned brother, Abdul Aziz Mohamad, JCA who heard the matter in the High Court held:

> (1) The exercise by the requisitionists of their requisitioning right pursuant to s. 144(1) of the Companies Act 1965 gave rise to certain duties on the directors. The duties were to forthwith act to convene the extraordinary general meeting and to hold it within the two-month period. The duties were owed to the requisitionists for their benefit.
>
> (2) If the directors fix a date for the meeting after the two-month period, they may be penalized under s. 369 of the Act. If the requisitionists feel aggrieved about the late date, they would be entitled to seek a remedy for an earlier date for the meeting. Therefore, if the meeting was nonetheless held on the late date, it would be because it still suited the requisitionists' purposes. If it were otherwise, they would have withdrawn their requisition or taken steps for the meeting to be held at an earlier date.
>
> (3) In light of the above, there was no rationale for holding that the meeting held after the two-month period was void. Subsection 1 did not say so. If at all there had been any offence under s. 144(1), it was the failure of the directors to convene the meeting forthwith and to convene it within the two months. There was no offence in the fact of the holding of the meeting itself.

(4) *The deadline imposed in s. 144(3) that a requisitionists' meeting should not be held later than three months, after the directors fail to hold one, is to maintain the good order in a company. As the power is now in their hands to achieve what they want, the requisitionists must not dally in achieving it.* (emphasis made)

In his judgment, at pp. 474 and 475, he made the following observations:

> The position is different under sub-s.(3). There, it is expressly stated that a meeting convened by the requisitionists themselves "shall not be held after the expiration of three months" from the date the requisition is deposited. *The sub-section forbids the holding of the meeting itself after the three months. I am able to discern a rationale for that. As I said, sub-s. (3) gives the requisitionists the right of self-help, and, as stated in Re Ariadne Australia Ltd, 2 ACLR 791, at p. 794, it is "to cloak the requisitionists with the power to act in place of the directors where the directors are refusing to call a meeting of shareholders which they are obliged to call." The rationale has to do with the maintenance of good order in a company. If the right of the requisitionists to themselves convene a meeting is viewed as a legally-sanctioned usurpation of the role of the established power, namely the directors, in order to achieve what the requisitionists themselves want, it is understandably desirable that, the power now being in their hands to achieve it, they must not dally in achieving it.* The state or usurpation must not be allowed to go on for longer than is necessary. Thus *the meeting that they convene must not be allowed to be held after the three months*. (emphasis added).

In my view, the observation made by him that the words "shall not be held after the expiration of the three months from that date" in s. 144(3) are mandatory and incapable of being enlarged is absolutely correct.

The application of s. 355 to remedy a defect had been discussed at great length in the case of *First Nominee (Pte) Ltd v. New Kok Ann Realty Sdn Bhd & Anor* [1983] 2 MLJ 76. In that case the applicant applied for an order that the register of members of the 1st respondent (the company) be rectified by striking out the name of the 2nd respondent as the holder of 1,000 shares of the company and that the notice of rectification be forwarded to the Registrar of Companies. The company was incorporated on 1 December 1971 with an authorized capital of RM3,000,000 in 30,000 shares of RM100 each. On 30 December 1978, it was decided that another 25,000 shares were to be issued. Of the 25,000 shares, 12,859 shares were allotted to the applicant and 12,139 shares were allotted to the 2nd respondent in accordance with the proportion of their holding. On 6 February 1979, the company convened a general meeting and passed a resolution to increase the capital of the company by another RM100,000 in 1,000 shares of RM100 each. These new shares were to rank in pari passu with those shares which had already been allotted. By that

resolution the applicant was purportedly allotted 510 of the shares while the 2nd respondent was purportedly allotted the remaining 490 shares. The applicant purportedly failed to subscribe to the 510 shares allotted to them and the company forfeited those 510 shares. Subsequently, those 510 shares were re-allotted to the 2nd respondent meaning that all the 1,000 new shares were allotted to the 2nd respondent. As a result of that the 2nd respondent became the majority shareholder of the company. Being unhappy with the twist of event, the applicant made an application to the court to rectify the register of the shareholders of the company in that the registration of the 2nd respondent as the shareholder of the new 1,000 shares be struck off from the register. In that application, the applicant alleged that they were not given the notice of the meeting and as such was not represented at the meeting where the resolution was passed. The applicant also alleged irregularities in that the issuance of the 1,000 new shares was improper and unlawful designed to gain control over the affairs of the company by the 2nd respondent. The evidence showed that the notice was sent to the applicant but returned undelivered and the notice was sent to the applicant eleven days before the meeting was held and therefore three days short of service required by the Memorandum and Articles of Association of the company. For that reason the notice was defective for being insufficient notice and accordingly the meeting was ineffective and the resolutions passed were invalid, unless validated under s. 355. Yusoff Mohamed J (as he then was) at pp. 77 and 78 stated:

> As conceded, the notice convening the meeting of February 6, 1979 was defective for being insufficient notice, and accordingly the meeting was ineffective and the resolution passed thereat invalid unless it is saved by a validation order under section 355 of the Companies Act, 1965. There has been no application for such order but the court on its own motion may make such an order as it thinks fit – section 355(3). The section provides:
>
> > 355(3) Without affecting the generality of subsection (1) and subsection (2) or of any other provision of this Act, where any omission defect error or irregularity (including the absence of a quorum at any meeting of the company or of the directors) as occurred in the management or administration of a company whereby any breach of this Act has occurred, or whereby there has been default in the observance of the memorandum or articles of the company or whereby any proceedings at or in connection with any meeting of the company or of the directors thereof or any assemblage purporting to be such a meeting have been rendered ineffective including the failure to make or lodge any declaration of solvency pursuant to section 257, the court:

(a) may, either of its own motion or on the application or any interested person, make such order as it thinks fit to rectify or cause to be rectified or to negative or modify or cause to be modified the consequences in law of any such omission defect error or irregularity, or to validate any act matter or thing rendered or alleged to have been rendered invalid by or as a result of any such omission defect error or irregularity;

(b) shall before making any such order satisfy itself that such an order would not do injustice to the company or to any member or creditor thereof.

Counsel for the respondent invited the court to make the validating order and urged that the discretion of the court under the section is vide and submitted that no injustice has been done to the applicant nor caused to the company.

There is no precedent on the application of section 355 of the Companies Act but on similar legislation in Australian Companies Act, 1961, the relevant section 366 is in pari materia with our section 355. The court there strictly construed the provision particularly where the irregularity involves a derogation from the rights of a person before allowing the section to operate, in order to invalidate the defective proceedings of the company. The criteria in exercising discretion is for the court to satisfy itself that any such order would not do injustice to the company or to any member or creditor thereof – section 355(3)(b).

In *Holmes v. Life Funds of Australia Ltd*, Street J., in evaluating the procedural justice or injustice in subsection (3)(b) of the section held that when determining the procedural justice or injustice attending the exercise of the court's discretion under section 366 (Australia), regard is to be had to the likelihood of prejudice to any individual member by reason of the defect or mission which took place. Where a company's general meeting and election of directors was involved for want of proper notice, the court ruled that section 366 was not apt to cure the defect – *Mansfield v. N.S.W. Leagues' Club Bowling Club Ltd.*

In evaluating the applicability of this section, the court is entitled to admit into evidence any facts which are relevant to the exercise of its discretion – *Re Australian Continental Resources Ltd.* In the present case, the notice convening the general meeting was three days deficient of the required period which resulted in non-attendance of the meeting by the applicant. This was followed by the call for payment of the new shares purportedly allotted to the applicant at the meeting and the subsequent forfeiture of these shares allotted to the applicant had derogated him to a minority shareholder in the company.

> In Re Australian Continental Resources Ltd, it has been said that the exercise of discretion provided in section 366(3) (Australian) implies a consideration of the relative gains or losses of the parties involved. Prejudice is not the criterion, justice is, and that justice may require that the prejudice to one party if the order were made be balanced against the respective prejudice to other parties if the order were not made.
>
> It would appear in this case that the absence of a proper notice to the applicant both in regard to the general meeting as well as the forfeiture of the purported new shares allotted to it, has substantially prejudiced its position in the company as a majority shareholder. This has caused injustice to the applicant. In the event I am of the view that on the balance of respective prejudice, a validating order should not be made and I should grant the application sought above, in terms with costs.

In the present appeal, the purpose of the meeting to be held is to remove some of the existing directors including the 2nd plaintiff and in their place to elect the directors of the defendant's choice. To do that, a proper and valid notice of such a meeting should be issued because that meeting would affect the right of those directors to be removed who had been duly elected at a proper and valid AGM of the company. For that, the process and procedure for calling such a meeting should be adhered to strictly as stated in *Mansfield v. N.S.W. Leagues' Club Bowling Club Ltd*, the Australian case cited in the above judgment, where it was held that a general meeting to elect the board of directors was held to be invalid for want of proper notice. In my view, any defect in the process or procedure in calling the meeting and at the meeting is not curable under s. 355 of the Act. In the present appeal, not only the notice was defective due to the fact that the meeting to be held exceeded the permissible three-month period but also that notice had been declared null and void. There is nothing to prevent the defendant from making another requisition for another EGM, whereby if the plaintiffs failed to convene the EGM requested, the defendant is at liberty to issue a proper and valid notice to hold the EGM.

In *Nyuk Fung & Ors v. Pan Global Equities Bhd* [1991] 1 CLJ 452; [1991] 1 CLJ (Rep) 406, the then Supreme Court cautioned the court in exercising the discretion under s. 355(3), lest the court be accused of taking side. In that case, a director of the respondent company applied to the court for relief under ss. 150 and 355(3) of the Act for an order that the company convene an extraordinary general meeting for the purpose of considering and, if deemed fit, to pass five resolutions in connection with the purchase of five properties. The High Court granted the application on 28 March 1990. The appellant and others who were the minority shareholders applied to intervene and upon leave

being granted they applied to set aside of the *ex parte* order dated 28 March 1990 on the ground that the subject matter of the application was not within the purview of s. 355(3) of the Act. The learned judge on 26 June 1990 dismissed the interveners' application but granted them leave to appeal. The dispute between the parties were in respect of an act done by the 'original directors'. Before this the appellant and his group by an extraordinary general meeting of the shareholders held on 5 September 1988, removed the 'original directors' and replaced them with 'interim directors'. On 7 September 1988, the judge of the High Court allowed an *ex parte* application by the 'original directors' for injunction to restrain the 'interim directors' from acting or exercising any of the functions or performing any of the duties of the respondent, and also an order that the 'original directors' be restored to the status quo prior to the EGM held on 5 September 1988. On the application of the 'interim directors', the learned judge set aside the *ex parte* order given on 7 September 1988. On appeal to the Supreme Court, the court on 27 September 1989 restored the *ex parte* order given on 7 September 1988. During the short-lived period of the interim directorship, the interim directors discovered material irregularities in the purchase of the five properties in that the purchase of the five properties were director-related transactions in breach of s. 132E(1)-(5) of the Companies Act. Secondly, the transactions were devised by the original directors to utilize the funds of PanGlobal to finance the acquisition or subscription of PanGlobal shares which was in contravention of s. 67. The interim directors had lodged a police report in respect of this. Subsequently, the interim directors revoked the decision of the original directors to purchase the five properties. The interim directors also caused PanGlobal to institute a civil action against the original directors for rescission of the five transactions and for repayment of all moneys paid by PanGlobal under the sale and purchase of those transactions. By way of an *ex parte* originating summons dated 12 February 1990, the original directors applied for relief under ss. 150 and 355(3) for an extraordinary meeting of PanGlobal be convened to consider and if it deems fit to pass five resolutions in connection with the purchase of the five properties. The reason why the original directors sought the court's assistance to call for the meeting as stated in the supporting affidavit were as follows:

(1) The difficulties in the finalization of PanGlobal's annual account arising from the uncertainty as to the manner in which the account should treat the purchase of the five pieces of properties by the company and on its wholly-owned subsidiary companies called PanGlobal Development Sdn Bhd (see para 6 of the affidavit).

(2) The desires of the original directors to be strictly impartial over the final fate of the five transactions. The shareholders should freely endorse or revoke the transactions and for that purpose the original directors thought it fit not to be a party to the calling of this particular EGM, without the assistance of the court (see paras 17 and 19 of the affidavit).

Mohd Azmi SCJ (as he then was) said:

> In our view, none of the reasons given can constitute an omission, defect, error or irregularity which has occurred in the management or administration of the company as required by s. 355(3) which empowers the court to exercise its discretionary power of rectification or validation. On the facts affirmed by Mr. Wong Swee Min, in his affidavit-in-support, there is nothing for the court to rectify or to validate. The court was not asked to rectify or validate anything. The court cannot act in vacuum under s. 355(3). Before there can be a basis for rectification or validation by the court, a breach of the Companies Act 1965 must have occurred, or a default, in the observance of the company's memorandum and articles must have taken place, or a company's or directors' meeting must have been rendered ineffective. Here, no breach of any kind has been particularized and conceded by Mr. Wong Swee Min, to render the purchase of the five properties void or ineffective.
>
> The learned counsel for the appellants had submitted that our s. 355(3) is equivalent to s. 366 of the old Australian Companies Act. According to him, the section applies only to rectification of procedural defects or irregularities, but not to supply the deficiency which caused the irregularity or defects. The court can only validate procedural irregularities or defects, such as defects in advertisements – *Langton v. Forsayth Mineral Exploration NL* at p 237; lack of quorum of meeting – *Re Eraville Pty Ltd* and Companies Act; short notice of a meeting – *Re Newman Pastoral Co Pty Ltd*; deficiency in explanatory statements – *Re Kallin Investment Ltd*; short notice to shareholders – *Re Clearwater Pty Ltd*; defective appointment of liquidator – *Re Abel Equipment Pty Ltd (In Liquidation)*; and late lodgment of declaration of solvency – *Re Helen Investments Pty Ltd.*
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> The learned counsel also cited *Re Lancer Corporation Pty Ltd* at p 170, where the Supreme Court of Queensland held:
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> > Under s. 366(1), (2) the court in a proceeding before it may declare that a 'proceeding under this Act' is valid notwithstanding any defect, irregularity or deficiency. Under s. 366(3) the power of the court in consequence of any 'omission, defect, error or irregularity … in the management or administration of a company …' whereby any of the consequences set out have occurred, is likewise not to declare that what has occurred is invalid. Nor is there a power to order that steps or actions be taken consequent upon such a declaration. The court may 'rectify or cause to be rectified or to negative or modify or cause to be

> modified the consequences in law of any such omission, defect, error or irregularity'. Or the court may validate any act, matter or thing rendered or alleged to have been rendered invalid by or as a result of any such omission, defect, error or irregularity. In other words, s. 366(3) is clearly directed to the modification or the negativing of the otherwise invalidating effect flowing from any 'omission, defect, error or irregularity' as set out.

In short, the submission of the learned counsel is that the remedial power is exercised in two ways: (i) by making an order to rectify the consequences which follow the defective act; or (ii) by declaring altogether valid what is invalid.

Next, the learned counsel referred to *Langton v. Forsayth Minerals Exploration NL* at p 237, where Mahoney JA. of the Supreme Court of New South Wales held:

> In respect of matters which depend for their correction or validation upon the exercise of the powers given by s. 366(3), the position is different. It is, in my opinion, clear that unless and until the court makes an order, the matters remain in their defective form; and before any such order can be made, the court 'shall' satisfy itself that the order 'would not do injustice to the company or to any member or creditor thereof.

In our opinion, in this case, if application had been made for the court to validate the five transactions, notwithstanding any breach of the provisions of the Companies Act 1965, it would have been a different matter. The properties were purchased without reference to a general meeting in the first instance. So, the court cannot order the calling of a meeting of the shareholders to consider validating the breach, because the court can only make an order under s. 355(3) to remedy the consequences which flow from the breach, and calling the EGM to consider the five resolutions is not a consequence of the breach. It is to supply the deficiency itself which has occurred. We are of the view that by granting the order, the court is not validating anything, but merely allowing the original directors to have a second bite at the cherry. This is clearly outside the purview of s. 355(3). The original directors must admit first that there was a breach by way of an omission to comply with the Companies Act 1965, before there can be validation by the court. Under the section, the validation of an invalid act, matter of thing must be by the court and not by the EGM. Unlike its power of rectification and modification, the court cannot cause a third party to validate or to consider validating an unlawful act under the Companies Act 1965.

Before us counsel for the respondent when queried for the actual need to come to court for validation or rectification explained that because the EGM had not been held within a reasonable period after the five transactions, there was viability to satisfy the 'reasonable time' requirement. Therefore, the respondent sought the assistance of the court to enable it to satisfy the reasonable time requirement. This is not specifically deposed in the affidavit-in-support of Mr.Wong Swee Min. Even if it had been so deposed, s. 355(3) would still not be applicable. There is admittedly nothing to stop the respondent from calling the EGM without the assistance of the court to consider the resolutions. It is only after such a meeting is held that the validity of the meeting could if at all be remedied under s. 355(3) notwithstanding that it was held out of time. Under the subsection, the court has no power to rectify anything which has yet to occur, or to validate any act which is not yet in breach of the Companies Act 1965. Any omission or irregularity or defect in the general meeting can only be determined after the meeting has been held, but not before.

Further, as stated earlier on, the appellants' allegations that the five transactions are in breach of s. 67 and s. 132C(1) of the Companies Act 1965 are contentious issues between the interim and original directors, and they are yet to be determined by the court. To allow the rectification at this stage would certainly do injustice to the appellants and as well as to PanGlobal. This requirement under para (b) of s. 355(3) did not seem to have been considered at all by the learned judge before exercising his remedial power under this provision. In this appeal we cannot and do not make any finding on the various allegations levelled against the original directors, particularly against Dato' Mak Kok. In our view, these allegations should be resolved in Civil Suit No. D4-22-186-88 or Civil Suit No. D1-22-1785-89 so that neither the interest of PanGlobal nor that of the original or interim directors may be prejudiced in any way.

Thus, merely because s. 355(3) confers a wide range of remedial discretion to the court does not mean that it is an unfettered discretion. We are of the opinion that the learned judge had exercised his discretion under s. 355(3) of the Companies Act on wrong principles, and as such the order dismissing the appellant's application must be set aside. There is of course nothing to stop the respondent from calling an EGM at any time on their own without the assistance of the court, to consider the five resolutions. On the facts of the present case neither the assistance of s. 150 nor s. 355(3) is necessary or warranted.

The above judgment clearly shows that the discretionary power under section 355 is not unfettered. It must be exercised judiciously and the justice of the case should be considered seriously. Bearing in mind that on the application by the plaintiffs, the court had on 29 July 2002 declared the notice to be invalid and ineffective because the meeting to be held exceeded the permissible period. On 5 August 2002, the same court without quashing or revoking the

order dated 29 July 2002, allowed an application by the defendant to enlarge the time to hold the meeting stated in the notice and at the same time held the notice to be valid and effective. Though there was an appeal against the order dated 29 July 2002, before us the defendant did not proceed with that appeal, the order dated 29 July 2002 was still subsisting and effective. The court should not have granted the order dated 5 August 2002 which in its essence nullified the order dated 29 July 2002.

Under s. 143 of the Companies Act 1965, it is a requirement that a company shall hold its annual general meeting (AGM) once in every calendar year. In between the AGM the company may also hold other general meetings including a meeting under s. 144 of the Act. The rationale for giving a timeframe for such a meeting is that it should be held before the next AGM or near the date of the EGM lest it would disrupt the holding of the AGM. It is not disputed that any issue or resolution to be tabled at the EGM could also be tabled at the AGM. As such it is useless to hold the EGM very near the date of the holding of the AGM. Another reason for a timeframe be given for EGM to be held under s. 144 is that there is no restriction to shareholders as to the number of requisitions to be made. In my view, when the defendant was told that the holding of the meeting stated in the notice was improper, the defendant could easily serve another requisition on the plaintiffs. In the present appeal the defendant could have applied to the court to call for the meeting under s. 150 which, in my view, would not affect the order dated 29 July 2002. Section 150 of the Act provides:

> 150 Power of Court to order meeting
>
> If for any reason it is impracticable to call a meeting in any manner in which meetings may be called or to conduct the meeting in the manner prescribed by the articles of this Act the Court may, either of its own motion or on the application of any director or of any member who would be entitled to vote at the meeting or of the personal representative of any such member, order a meeting to be called held and conducted in such a manner as the Court thinks fit, and may give such ancillary or consequential directions as it thinks expedient, including a direction that one member present in person or by proxy shall be deemed to constitute a meeting or that the personal representative of any deceased member may exercise all or any of the powers that the deceased member could have exercised if he were present at the meeting.

In the present appeal, the learned Judicial Commissioner in her judgment gave the reasons why she allowed the application by the defendant. The reasons given by the learned Judicial Commissioner in allowing the application by the defendant for enlargement of time would be sufficient for the learned Judicial Commissioner to exercise her discretion to call for a meeting under s. 150.

Apparently, the learned Judicial Commissioner was not willing to exercise her discretion to convene the EGM under s. 150 because there was no application by the defendant.

In allowing the application for enlargement of time and the declaration that the notice is valid and effective, in my view, had caused injustice to the plaintiffs. It is interesting to note that the learned Judicial Commissioner in her judgment explained that she allowed the application by the defendant because of justice. She blamed the plaintiffs for not convening the EGM after receiving the requisition and that the request for the list of the shareholders was not entertained by the plaintiffs. The requisition clearly stated that the reason for the requisition was to remove several directors (including the 2nd plaintiff) of the 1st plaintiff and replace them with the directors from their group. Apparently, there was a power struggle between the plaintiffs' group and the defendant's group. I see no reason for blaming the plaintiffs in not holding the EGM because they were resisting the removal of the directors elected at the previous AGM. It is not in the interest of the present directors of the company including the 2nd plaintiff to convene the EGM. In respect of supplying the list of shareholders, the failure of the plaintiffs to supply the list of the shareholders, would not in any way affect the defendant's right to call for the EGM within the stipulated period. First of all, the list of shareholders could be obtained from the Registrar of Companies because it is a requirement of the Act that any change in the shareholding of the company must be filed with the Registrar of Companies. Further, upon reading s. 144 in particular s. 144(3), I could not find any requirement for the full list of the shareholders to be supplied before the defendant could call for the EGM. Section 144(3) in respect of convening a meeting provides as follows:

> (3) … the requisitionists, or any of them **representing more than one-half of the total voting rights of all of them, may themselves,** in the same manner as nearly as possible as that in which meetings are to be convened by directors **convene a meeting,** … (emphasis added).

My understanding of the provision is that when the directors of the company failed to convene a meeting within 21 days pursuant to the requisition, then the requisitionists by themselves or anyone amongst them holding one-half shareholding with voting rights can convene the EGM. From the evidence, it is clear to me that the defendant represents more than one-tenth of the shareholders of the 1st plaintiff. Otherwise it would not meet the requirement to make the requisition under s. 144(1). It is also clear that the defendant's solicitors gave the notice on behalf of the defendant who represented all the requisitionists and as such there is no requirement for the one half anymore.

I see no reason why the defendant must wait for the list of shareholders from the plaintiffs. If the list is required to inform each individual shareholder of the company then this could easily be overcome by advertising the notice in the local newspapers. The failure on the part of the plaintiffs to supply the list of shareholders is only an excuse by the defendant to justify their application for enlargement of time. For the above reasons, I find the reasons given by the learned Judicial Commissioner that the failure of the plaintiffs to call for the EGM and to supply the list of shareholders had caused injustice to the defendant are not convincing.

For the reasons I have stated above, I am of the view that the learned Judicial Commissioner was in error when she granted the order dated 5 August 2002. In my view, she was in error in exercising her discretion under s. 355(3) to grant the order.

My learned brother, Hashim Yusoff, JCA has read this judgment in the draft and conveyed his agreement to this judgment.

For the above reasons, by majority the appeal by the plaintiffs is hereby allowed with costs here and below. The order of the Judicial Commissioner dated 5 August 2002 is hereby set aside. The deposit is to be refunded to the plaintiffs.

Abdul Aziz Mohamad JCA:

These two appeals, which were agreed to be heard together, involved a consideration of ss. 144(3) and 355(4) of the Companies Act 1965.

By subsection (1) of s. 144, the directors of a company are bound, on the requisition of members having between them the specified qualification or strength, to "forthwith proceed duly to convene an extraordinary general meeting of the company to be held as soon as practicable but in any case not later than two months after the receipt by the company of the requisition". Subsection (3) provides as follows:

> (3) If the directors do not within twenty-one days after the date of the deposit of the requisition proceed to convene a meeting the requisitionists, or any of them representing more than one-half of the total voting rights of all of them, may themselves, in the same manner as nearly as possible as that in which meetings are to be convened by directors convene a meeting, but any meeting so convened shall not be held after the expiration of three months from that date.

Subsection (4) of s. 355 provides as follows:

> (4) The Court (whether the company is in process of being wound up or not) may enlarge or abridge any time for doing any act or taking any proceeding allowed or limited by this Act upon such terms, if any, as the justice of the case may require and any such enlargement may be ordered although the application for the same is not made until after the time originally allowed or limited.

On 22 April 2002 the directors of SJA Berhad ("SJA") were served with a requisition under s. 144(1). The purpose of the extraordinary general meeting ("EGM") that was the subject of the requisition was to appoint two directors and remove a number of directors, including one Tan Hock Lai @ Tan Hock Chan ("Tan"), SJA's managing director. The requisition was by HLB Nominees (Tempatan) Sdn Bhd ("HLB"), a member of SJA holding not less than one-tenth of the paid-up capital of SJA, which status qualified HLB under s. 144(1).

The directors did not convene the meeting, so that from 14 May 2002, which was twenty-one days after the date of the deposit of the requisition, as specified by s. 144(3), HLB became entitled to themselves convene an extraordinary general meeting. But for a reason which will later appear, it was only on 9 July 2002 that HLB issued a notice to shareholders of an EGM. Because statute required a notice of twenty-eight days (ss. 128(2), 153), the date of meeting given in the notice was 7 August 2002.

On 24 July 2002, which was two days after the expiration of the three months specified in s. 144(3), if the three months were to be reckoned from the date of the deposit of the requisition, SJA and Tan filed an originating summons for the determination of the question whether the three-month period in s. 144(3) was to be construed as running from the date of the deposit of the requisition, as SJA and Tan were to contend, or from the expiry of twenty-one days after the date of the deposit of the requisition, that is from 14 May 2002, as HLB were to contend.

It was a question of what date is meant by the words "that date" at the end of subsection (3). If that date, as SJA and Tan were to contend, was the date of deposit of the requisition, 22 April 2002, then the meeting on 7 August 2002 would be after the expiration of three months from that date, which would be contrary to s. 144(3). If that date was 14 May 2002, as HLB were to contend, then the date of meeting, 7 August 2002, would be within the three months. Should they be right on the question of interpretation, SJA and Tan sought, consequentially, (a) a declaration that the notice of the EGM dated 9 July 2002 was "null and void and of no effect", (b) in the meantime an

interlocutory injunction to restrain the holding of the EGM on 7 August 2002 "until the final determination of the proceedings herein or until further order", and also costs, damages and other reliefs.

On 29 July 2002 the learned judge (Judicial Commissioner by appointment) found in favour of SJA and Tan on the interpretation of s. 144(3) and made the consequential orders sought. That decision gave rise to HLB's appeal to this court, which was appeal No. 656.

In their first affidavit in reply to the originating summons, HLB, who were the defendants, had explained that their delay in giving notice of the EGM was due to the obstructive and delaying tactics on the part of SJA and Tan, particularly in the matter of providing HLB with a list of shareholders of SJA to enable HLB to send notices of the EGM to them. In para. 28 of the affidavit HLB had urged the court, should the court rule against them on the interpretation of s. 144(3), to exercise its discretion under s. 355(4) to enlarge the time for holding the EGM.

Before making the orders of 29 July 2002 the learned judge said this, according to her notes:

> The defendant should have applied for enlargement of time which it has not done except for an oral application and in para 28 of the defendant's affidavit in reply which the court rules to be insufficient.
>
> Nevertheless there is nothing to stop the defendant from making a proper application if it so chooses subsequently.

And the orders were accompanied by these subsequent words: "The interlocutory injunction granted will remain effective until further order of this court".

In her written grounds of judgment, the judge said in the last paragraph:

> Nevertheless, in view of the obstructive and delaying acts of the defaulting directors, the court gave liberty to the defendant to apply formally for enlargement of time by ruling that there was nothing to stop the defendant from making a proper application for enlargement of time if it so chooses to do so subsequently and that the interlocutory injunction granted by the court will remain effective until further order of the court.

So on 31 July 2002 HLB filed a summons in chambers for three orders. The first was an order under 355(4) enlarging the time for holding the EGM from 22 July 2002, the last date on which according to s. 144(3) it should have been held, to 7 August 2002, the date fixed by the notice of 9 July 2002. In tandem with the first order, a further order was also sought pursuant to s.

355(3) in respect of the notice, which I need not mention the purport of because I thought it was merely a matter of unnecessary legal fastidiousness. The second and third orders sought were consequential orders that the notice of 9 July 2002 be declared valid and effective and that the interlocutory injunction granted on 29 July 2002 be set aside. On 5 August 2002, two days before the date fixed for the EGM, the learned judge granted the orders. That decision gave rise to the appeal No. 597 by SJA and Tan, the plaintiffs in the High Court.

A factor which greatly influenced the judge to grant the order can be seen in the following passages in her grounds of judgment. At p. 7 she said:

> … there has been not only considerable delay on the part of the plaintiffs but a total failure on the part of the plaintiffs to consent to the supplying of a copy of the share register to the defendant which delay and failure have resulted in the inability of the defendant to comply with the time limit stipulated in s 144(3) of the Act …

Further on, at pp. 9 and 10, she said:

> … the inability of the defendant to convene the EGM on or before 22nd July 2002, which is the last date for the holding of the EGM is caused or substantially contributed to by the plaintiffs' obstructive and hindering acts in wilfully withholding from the defendant a copy of the share register when the defendant was at all times ready and willing to pay the requisite costs in order to obtain it.

In the course of his submission on the interpretation of s. 144(3), which formed the subject of HLB's appeal, their counsel, after remarks from the court, decided not to pursue the question of interpretation. It was a correct decision on his part. For my part, there could be no doubt that the words "that date" at the end of s. 144(3) pointed to the only other word "date" mentioned in the subsection, that is "the date of the deposit of the requisition". Counsel's decision, which was to result in HLB's appeal being dismissed at the end of the day, left us with only the appeal of SJA and Tan to be considered, appeal No. 597 which concerned the judge's orders under s. 355.

SJA and Tan, whom from now on I shall refer to as "the appellants", gave three grounds for contending that the judge had erred in her decision. They were grounds (a), (b) and (c) in para. 2 of the memorandum of appeal.

Ground (a)

Ground (a) was in essence as follows:

> That the [judge] having made an order … whereby the … Notice of EGM was declared null and void and as of no effect the Court was thereafter functus officio and had therefore no jurisdiction to reopen, in the same proceedings, the issues already settled in the Order of 29-7-2002 which had been duly sealed, extracted and served.

It was a point of *functus officio* – one of jurisdiction – to which, in submission before us, the appellants' counsel tagged on a point of *res judicata*. Whether the point was of *functus officio* or of *res judicata*, the attack was against the validating of the notice of the EGM which the judge had already, upon deciding the question of interpretation of s. 144(3), declared invalid. It amounted to saying that having declared the notice invalid the judge no longer had jurisdiction to sit in judgment on the question of validity of the notice and even if she still had jurisdiction she ought not to have decided contrary to what she had already decided. Ground (a) was not framed as an attack on her hearing of the application for enlargement of time and deciding on it, mounted on the basis that it was an application that was barred in law. Enlargement of time was a separate issue from the finding, on a proper construction of s. 144(3), that holding a meeting on 7 August 2002 would be in contravention of the section and that therefore the notice was invalid, although it involved having to overcome the fact that the notice had already been declared invalid.

Here I thought it was necessary to look at the reality of the situation. And the reality of the situation was reflected in the submission of the appellants' counsel that the judge should have adjourned the appellants' application – or I should perhaps say postponed her decision on it as to the validity of the notice – to enable HLB to apply for enlargement of time. The reality of the situation was this. The judge had before her an application for a determination of the meaning of the words "that date" at the end of s. 144(3) and for a consequential order, besides others, that the notice be declared to be invalid if the basic question was decided in the appellants' favour. In the course of hearing the application she saw that it was owing to the conduct of the appellants that HLB could not give the notice of the EGM earlier so as to avoid the EGM being held beyond the time allowed by s. 144(3). She must have been sympathetic with HLB. But although HLB pleaded with her to exercise her discretion to enlarge the time, she felt that she could not entertain the plea except on a formal written application. If she had seen that she could entertain the plea, and then proceeded to hear argument on it and seen merit in it, she would have construed s. 144(3) in favour of the appellants but

exercised her discretion to enlarge the time and not make the declaration that the notice was void. As it was, she proceeded to decide on the appellants' application and gave the orders sought, including the declaration that the notice was invalid, but gave HLB leave to apply for enlargement of time, thereby consciously leaving open the enlargement question and reserving to herself the right to deal with it when the time came. She could have refrained from declaring that the notice was not valid until the application for enlargement of time was made and disposed of, but since there might not be such an application, it would be neater to dispose of the appellants' application fully at that stage by making the orders sought. Considering the reality of the situation, the order of invalidation had to be seen as a provisional order in intention, that is to say, an order that declared that the notice was invalid only as matters stood and subject to enlargement being granted, which, if and when granted, would validate the notice. I therefore did not think that the circumstances warranted the application of the principles of *functus officio* and *res judicata.*

Ground (b)

Ground (b) was in essence as follows:

> That in any event, the time limit prescribed in section 144(3) … was mandatory and that in the circumstances section 355(4) … could not be invoked …

Before us the appellants' counsel submitted that the period in s. 144(3) was mandatory and could not be extended despite s. 355(4). Section 355(4), confining it to the needs of this case, gives the court discretion to "enlarge … any time for doing any act or taking any proceeding … limited by (s. 144(3))", the word "limited" having reference to the "time". The question in effect posed by the submission was whether there was anything in s. 144(3) that prohibited the exercise of the discretion under s. 355(4) to enlarge the time limited by s. 144(3) for holding the EGM. Section 144(3) limits the time by the words "but any meeting so convened shall not be held after the expiration of three months from that date". The limiting is couched as a prohibition, and counsel cited my saying in *Dato' Hamzah Abdul Majid & Anor v. Wembley Industries Holdings Bhd* [1998] 4 CLJ Supp 471 at p. 473e that the holding of the requisitionists' "self-help" meeting after the period was "forbidden". At p. 474g I said: "The subsection forbids the holding of the meeting itself after the three months". That is what the words of the subsection do. But that does not mean that the three months cannot be enlarged. The fact of forbidding will not be affected by the enlargement, because the subsection will then have to be construed as intending to also forbid the holding of the meeting after the enlarged time. In that case I was not dealing with any question of enlargement of the period. In fact, the issue in that case

was the holding of a meeting under subsection (1) beyond the two months, and I mentioned the position under subsection (3) by way of comparison. Towards the end of my judgment, I spoke of the rationale for subsection (3), or what I thought it to be, in these words:

> The position is different under sub-s. (3). There, it is expressly stated that a meeting convened by the requisitionists themselves "shall not be held after the expiration of three months" from the date the requisition is deposited. The sub-section forbids the holding of the meeting itself after the three months. I am able to discern a rationale for that. As I said, sub-s. (3) gives the requisitionists the right of self-help, and, as stated in *Re Ariadne Australia Ltd*, 2 ACLR 791, at p. 794, it is "to cloak the requisitionists with the power to act in place of the directors where the directors are refusing to call a meeting of shareholders which they are obliged to call." The rationale has to do with the maintenance of good order in a company. If the right of the requisitionists to themselves convene a meeting is viewed as a legally-sanctioned usurpation of the role of the established power, namely the directors, in order to achieve what the requisitionists themselves want, it is understandably desirable that, the power now being in their hands to achieve it, they must not dally in achieving it. The state of usurpation must not be allowed to go on for longer than is necessary. Thus the meeting that they convene must not be allowed to be held after the three months.

I was speaking in the context of the section as it stood and did not have in mind the question of enlarging the period under s. 355(4). If what I discerned to be the rationale for s. 144(3) is right, that is yet no reason why the period cannot be judicially extended where there is proper justification for it, as there was in this case, where it was the "established power" itself, that is the directors, that had disabled HLB from meeting the deadline. I was of opinion that, in view of the existence of s. 355(4), it would require express words to render the period in s. 144(3) incapable of enlargement.

Ground (c)

This ground was in essence as follows:

> That, in any event, the Respondent/Defendant could not rely on section 355(4) … as it had failed to place sufficient material before the Court to enable it to properly exercise its discretion to extend time …

I have already quoted passages from the judge's grounds of judgment in which she dealt with the failure of the appellants to supply HLB with the register of shareholders. In her grounds of judgment on the appellants' interpretation application, she had already dealt at some length at pp. 37-40 with the evidence of the appellants' delaying tactics. There was therefore ample material before the judge for her to arrive at the conclusion that I quoted, and in submission

before us under this head the appellants' counsel made only one comment on this question of fact. HLB, as the judge found, had, upon their right to themselves convene the EGM arising on 14 May 2000, taken immediate steps to convene the EGM by writing to SJA's share registrars on that date through their solicitors to request for a list of the shareholders and their addresses. The solicitors said: "Our client will reimburse you for any cost incurred". Section 160(3) gives a member the right, upon request to the company, to be furnished with a copy of the register. The request must be fulfilled normally within twenty-one days of its receipt, but payment for the copy must be made in advance and the normal rate is one ringgit for every hundred words. The only comment made by the appellants' counsel was that HLB's solicitors in their request of 14 May 2002 failed to ask how much was to be paid and therefore the fault was not SJA's if the request was not fulfilled. I did not think that the appellants' counsel was in earnest in making the comment. Obviously, whether or not the request asked about the payment – and in fact it did come with an undertaking to pay the "cost" incurred – the share registrars should, if they wished to comply with the request, have written back and said that the list of shareholders would be supplied upon payment of such and such a sum.

I saw no merit in the appellants' appeal and I was of the view that it should be dismissed.